

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

UNITED STATES OF AMERICA, et al.,

Plaintiffs,

v.

JETBLUE AIRWAYS CORPORATION and
SPIRIT AIRLINES, INC.,

Defendants.

Civil Action No. 1:23-cv-10511-WGY

**JOINT MOTION TO IMPOUND PORTIONS OF THE
PARTIES' EVIDENCE REFERENCED IN OPPOSITIONS TO MOTIONS *IN LIMINE***

Pursuant to Local Rule 7.2 and the Stipulated Protective Order entered by the Court on March 21, 2023 (ECF No. 66), the Parties hereby move this Court for an Order impounding portions of evidence the parties intend to file in opposing motions *in limine*. In support of this Joint Motion to Impound, the parties state as follows:

1. The Parties filed motions *in limine* on September 11, 2023. In advance of those filings, the Parties met and conferred regarding the proposed motions *in limine* and potential confidentiality concerns. The Parties have undertaken a similar process with respect to the opposition briefs.

2. The Parties have worked collaboratively to identify confidential business information quoted or cited in the oppositions to the motions *in limine* that may be appropriate for impoundment. The Parties are filing today three oppositions to motions *in limine* that do not require any impoundment. Defendants' oppositions to DOJ's motions regarding Richard Scheff (ECF No. 179) and Sara Nelson (ECF No. 171) do not contain any confidential information. DOJ's

oppositions to Defendants' motion regarding estoppel (ECF No. 167) does not contain any confidential information.

3. **JetBlue Confidential Business Documents:** JetBlue requests the impoundment of the following internal JetBlue documents, which contain highly sensitive and confidential business information. DOJ intends to rely on these documents in its opposition to Defendants' motion *in limine* regarding the opinions Plaintiffs' expert Dr. Tasneem Chipty (ECF No. 177):

- a. JetBlue requests impoundment of JBLU_MERGER_LIT-01112906, which contains highly sensitive, non-public information related to JetBlue's future network growth strategy and detailed, forecast analyses for specific routes.
- b. JetBlue requests impoundment of JBLU-DOJ-01184406, which contains granular, non-public information related to JetBlue's internal transaction-related synergies analyses/modeling, including details regarding the underlying assumptions.
- c. JetBlue requests impoundment of JBLU-DOJ-04194562, JBLU-DOJ-04260597, JBLU-DOJ-06183756, JBLU-DOJ-06323142, JBLU-DOJ-10617739, and JBLU-DOJ-10840850, which contain granular, non-public information related to JetBlue's internal transaction-related synergies analyses/modeling, including details of the underlying assumptions, formula and calculation.
- d. JetBlue requests impoundment of JBLU-DOJ-05815880, which contains highly sensitive, non-public information related to JetBlue's five-year plan, including financial forecasts, future strategic initiatives, planned investments, and future integration plans.

Disclosure of this information would cause significant harm to JetBlue, as this information is not otherwise known to the public, including JetBlue's competitors, and its disclosure could put JetBlue at a significant disadvantage with other airlines.

4. **Confidential Materials Related to Expert Tasneem Chipty:** Plaintiffs are filing an opposition to Defendants' motion *in limine* regarding the expert opinions of Plaintiffs' expert Dr. Tasneem Chipty. As part of their opposition, Plaintiffs will be relying on paragraphs 117-154 of Dr. Chipty's initial report and Section 5 of Dr. Chipty's reply report.

- a. JetBlue seeks impoundment of paragraphs 17, 50, 119, 123, 125-150, 152-154 in Dr. Chipty's initial report because they contain granular, non-public business information related to JetBlue's internal analyses/modeling regarding the combined network plan and transaction-related synergies, including details of the underlying assumptions, formula and calculation. Disclosure of this information would cause significant harm to JetBlue, as this information is not otherwise known to the public, including JetBlue's competitors, and its disclosure could put JetBlue at a significant disadvantage with other airlines.
- b. JetBlue also seeks impoundment of paragraphs 64, 65, 67, 71, 86-91, and 94 in Section 5 of Dr. Chipty's reply report because they contain confidential, non-public business information related to JetBlue's internal analyses/modeling regarding the transaction-related synergies and the combined network plan, including details of the underlying assumptions and calculations. Disclosure of this information would cause significant harm to JetBlue, as this information is not otherwise known to the public, including JetBlue's competitors, and its disclosure could put JetBlue at a significant disadvantage with other airlines.

- c. Spirit seeks impoundment of paragraphs 123, 127, 149, 152 and the last sentence of paragraph 135 of Dr. Chipty's initial report because it contains confidential information about Spirit's expansion plans and strategy. Spirit does not make this information public in the ordinary course of business and disclosure of this information would cause Spirit competitive harm by revealing its confidential business plans and strategy to its rivals, giving them an unfair advantage and damaging Spirit's competitive standing.

5. **Confidential Information in Expert Report of Nicholas Hill:** As part of Defendants' opposition to Plaintiffs' motion *in limine* regarding out-of-market benefits (ECF No. 174), Defendants will be relying on the following excerpts from the expert report of Nicholas Hill for which JetBlue seeks impoundment:

- a. Hill Report ¶ 12, 26, 31, 230, 233, 244, 256-57; Fig. 82; Sec. 10.1: These paragraphs include confidential information on non-parties, as well as JetBlue confidential information regarding non-public business information and information related to the merger. Disclosure of this information would cause significant harm to JetBlue, as this information is not otherwise known to the public, including JetBlue's competitors, and its disclosure could put JetBlue at a significant disadvantage with other airlines.

6. **Confidential JetBlue Deposition Testimony:** Plaintiffs are filing oppositions to Defendants' motions *in limine* regarding Plaintiffs' expert Dr. Tasneem Chipty and regarding "proxy fight evidence" (ECF No. 175). As part of their oppositions, Plaintiffs will be relying on excerpts from various depositions. JetBlue requests the impoundment of the following excerpts:

- a. Friedman CID 30(b)(6) Dep. Tr. at 197-198, 211: JetBlue requests impoundment of the portions of Eric Friedman's January 19, 2023 deposition testimony discussing granular, non-public business information related to JetBlue's internal transaction-related synergies analyses/modeling, including details of the underlying assumptions, formula and calculation.
- b. Friedman Litigation 30(b)(6) Dep. Tr. at 63-64, 69, 71, 93: JetBlue requests impoundment of the portions of Eric Friedman's June 22, 2023 30(b)(6) deposition testimony discussing granular, non-public information related to JetBlue's internal analyses/modeling related to the future JetBlue/Spirit combined network plan, including details of the underlying assumptions, formula and calculation.
- c. Gorelik Dep. Tr. at 173-174: JetBlue requests impoundment of the portions of Alla Gorelik's June 16, 2023 deposition testimony discussing granular, non-public information related to JetBlue's internal transaction-related synergies analyses/modeling, including details of the underlying assumptions, formula and calculation.
- d. Hurley Dep. Tr. at 295, 300: JetBlue requests impoundment of the portions of Ursula Hurley's June 21, 2023 deposition testimony discussing granular, non-public information related to JetBlue's internal transaction-related synergies analyses/modeling, including details of the underlying assumptions.
- e. Hill Dep. Tr. at 127-128: JetBlue requests impoundment of the portions of Dr. Hill's September 6, 2023 deposition testimony discussing JetBlue's future pricing strategy post-merger.

Disclosure of this information would cause significant harm to JetBlue, as this information is not otherwise known to the public, including JetBlue's competitors, and its disclosure could put JetBlue at a significant disadvantage with other airlines.

7. **Other Confidential JetBlue Materials:** Plaintiffs are filing an opposition to Defendants' motion *in limine* regarding Dr. Chipty. As part of their opposition, Plaintiffs will be relying on pages 68 through 87 of the Response of JetBlue Airways to the Antitrust Division DOJ's Request for Additional Information and Documentary Material dated December 12, 2022.

JetBlue requests impoundment of pages 68 through 87 of the Response of JetBlue Airways to the Antitrust Division DOJ's Request for Additional Information and Documentary Material, December 12, 2022, which contains granular, non-public information related to JetBlue's future network strategy and internal analyses/modeling regarding the transaction-related synergies. Disclosure of this information would cause significant harm to JetBlue, as this information is not otherwise known to the public, including JetBlue's competitors, and its disclosure could put JetBlue at a significant disadvantage with other airlines.

8. Plaintiffs do not agree that most of the material Defendants seek to impound, especially with respect to "information related to transaction related synergies" and "underlying assumptions" thereto, meets the high standard for sealing in this Court. A party seeking to seal materials filed in connection with motions in limine and to overcome the presumption of public access must demonstrate significant countervailing interests, like the existence of trade secrets or business information that might harm a litigant's competitive standing. *See, e.g., Bradford & Bigelow, Inc. v. Richardson*, 109 F. Supp. 3d 445, 447-49 (D. Mass. 2015). Material should not be subject to sealing absent "some compendium of chapter and verse—a demonstration that cognizable harm is lurking in the background." *F.T.C. v. Standard Fin. Mgmt. Corp.*, 830 F.2d

404, 412 (1st Cir. 1987). Furthermore, it appears that some of the material Defendants seek to impound is already publicly available. For example, On April 6, 2022, Ms. Hurley told investors that: “[I]n regards to the net synergy numbers, the revenue assumptions assume a full conversion of the Spirit’s aircraft into JetBlue configuration. And so those are all net in the \$600 million to \$700 million number that we provided.” That is non-confidential, public information. Nevertheless, JetBlue claims pages 295 and 300 of Ms. Hurley’s deposition transcript involve “granular, non-public information related to JetBlue’s internal transaction-related synergies analyses/modeling, including details of the underlying assumptions.” Comparing Ms. Hurley’s public statements with pages 295 and 300 of her deposition demonstrate that Defendants’ position on impoundment is unjustified.

9. Notwithstanding Plaintiffs’ views on the merits of Defendants’ position on impoundment, and without prejudice to Plaintiffs’ ability to later seek unsealing of these materials, the Parties request that an Order be issued by the Court and that order remain in effect until such time that it be lifted by further order of the Court and that the papers be kept in the Clerk’s non-public information file during any post-impoundment period.

10. The Parties will serve copies of the unredacted documents on opposing counsel and will hand-deliver the papers to the Court. The Parties will also work together this week to prepare redacted versions of the impounded exhibits containing portions from the expert reports and other confidential materials that are being filed in connection with the motions *in limine*.

WHEREFORE, the Parties respectfully request that this Court grant their Joint Motion to Impound until further order of the Court.

Dated: September 20, 2023

Respectfully submitted,

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LOCAL RULE 7.1(a)(2) CERTIFICATION

I, Elizabeth M. Wright, hereby certify that pursuant to Local Rule 7.1(a)(2), counsel for all Parties conferred in good faith before filing this Motion in an attempt to resolve or narrow this issue. The Parties have agreed to file this Motion jointly.

/s/ Elizabeth M. Wright
Elizabeth M. Wright.

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that on this 20th day of September, 2023, the foregoing document was filed through the ECF system and will be sent electronically to the registered participants on the Notice of Electronic Filing and paper copies will be sent to any non-registered participants.

/s/ Elizabeth M. Wright
Elizabeth M. Wright